83 - 1649

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

FRANCIS A. BEIMERT,
Petitioner,

VS.

BURLINGTON NORTHRN, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR CERTIORARI

RANDOLPH E. SCHUM
PAUL L. PRATT. P.C.
P.O. Box 179
East Alton, IL 62024
(618) 259-8011
Attorneys for Petitioner

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

QUESTIONS PRESENTED FOR REVIEW

Did the trial court abuse his office and deprive the petitioner of his constitutional right to trial by jury as guaranteed by the Seventh Amendment through improper comments which withdrew from the jury the determination of the issue of proximate cause?

Did the trial court violate Rule 51 of the Federal Rules of Civil Procedure and commit reversible error to the prejudice of the petitioner through the delivery of the instructions to the jury with material changes from those the court represented would be given and through the creation of an additional instruction?

Did the trial court commit reversible error to the prejudice of the petitioner in giving defendant's instruction number 8B over the objections of the plaintiff?

Did the trial court commit reversible error in admitting evidence of contributory negligence and allowing the respondent to argue it to the jury as a defense to the Safety Appliance Act?

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OPINIONS BELOW

The opinion of the Court of Appeals for the Eighth Circuit is not yet officially reported but a copy is included within the appendix.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was made and entered on February 2, 1984 and the petition for rehearing in banc was denied on March 7, 1984, copies of which are included within the appendix to this petition.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND FEDERAL RULES INVOLVED

Amendment VII, Constitution of the United States

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

45 U.S.C. §4

> "Unless otherwise ordered by the Secretary of Transportation, it shall be unlawful for any railroad to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

Rule 51 of the Federal Rules of Civil Procedure

> "At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are complete. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury."

STATEMENT

The petitioner filed a complaint under the Federal Employers' Liability Act and the Safety Appliance Act against his employer for injuries sustained on April 30, 1981, while in the course of his employment with the respondent at the Northtown Yards in Minneapolis, Minnesota (R.2). Only Count II pertaining to the Safety Appliance Act was tried before the jury (IV.Tr.17,26).

During the trial it was uncontested that the respondent had violated the Safety Appliance Act because the handhold on the box car was bent and defective due to insufficient clearance between the handhold and the end sill. The only issues to be resolved by the jury, therefore, were proximate cause and damages.

The trial commenced on December 7, 1982, with the petitioner's opening statement. The respondent, in its opening statement, argued that the sole cause of the petitioner's injuries was the method that he selected to do the work when there were other methods such as bad-ordering the car, getting others to do it, or using a Bradley bar which was "more suitable" and "a much safer method" (IV.Tr. 26-27). The petitioner made a timely objection that any reference to negligence issues was improper as not being relevant under the Safety Appliance Act (IV.Tr.26). The respondent stated to the court that "if we can establish that the injury resulted solely through the negligence of Mr. Beimert, that would be a defense even to the Safety Appliance Act" (IV.Tr.26). The court allowed the respondent to proceed and interject the issue of contributory negligence in the case (IV.Tr.26).

The first witness to testify was Woodrow Swentek, a railroad employee since 1946 and currently a car inspector for the respondent (IV.Tr.29). On April 30, 1981, he was working with the petitioner in the receiving yard (IV.Tr.29-30). Swentek worked one side of the train inspecting and repairing cars while the petitioner worked the other (IV.Tr.30). They performed

this work so that the cars could continue in transit to their destination (IV.Tr.30). Swentek saw the petitioner with his hands in the air and his yard bar on the handhold, and then heard a groan and found the petitioner on the ground (IV.Tr.30). Swentek found the petitioner bleeding from the forehead, got him out of the way of other tracks, and made arrangements for medical evacuation (IV.Tr.31).

Swentek stated that straightening a handhold would be expected of every carman employed by the defendant (IV.Tr.50). He had repaired them and stated that the employer encouraged them to repair them to avoid the resultant delay from bad-ordering the car (IV.Tr.31).

Swentek filled out two reports pertaining to the injury to the petitioner at the request of his employer (IV.Tr.32). Plaintiff's Exhibit 1 was a personal injury report he prepared in which he indicated the handhold was defective because it was bent and also that the petitioner was attempting to straighten the handhold when the bar slipped off of the handhold and hit him in the head (IV.Tr.33). He also signed Plaintiff's Exhibit 2, a three-man inspection report of the box car involved in the petitioner's injury (IV.Tr.34). Page one of that report included potential defects other than those covered by the Safety Appliance Act and none were found by the inspection team (IV.Tr. 35). Page two covered the items included within the Safety Appliance Act and a defect was noted pertaining to the lowest handhold in that there was insufficient clearance between the handhold and the end sill (IV.Tr.35-37). Swentek testified that there was not enough clearance to use the handhold safely and securely for climbing (IV.Tr.37). He identified the defective handhold in Plaintiff's Exhibits 4 and 5 (IV.Tr.38).

Over the objection of the petitioner on the basis of the relevancy of alternative methods of doing the work under the Safety Appliance Act, (IV.Tr.42), the respondent was permitted to elicit testimony that Jeep repairmen could have been called in to do the work and that a Bradley bar provided more leverage

and was a safer tool than the brake shoe bar or yard bar used by the petitioner (IV.Tr.43-47). Swentek further testified that it could take a half-hour to an hour for the Jeep repairmen to get there and the carmen were instructed to attempt to repair the handholds (IV.Tr.48-49). There would be repercussions if a carman saw a defective handhold, decided not to repair it, and only called the Jeep repairmen (IV.Tr.49).

Francis Beimert, 29 years of age (IV.Tr.51), was hired by the Burlington as a helper in February of 1973 (IV.Tr.52). He was promoted to a carman apprentice, carman, and foreman before going back to work as a carman and relief foreman (IV.Tr.53).

On April 30, 1981, at approximately 11:00 and 11:30 a.m., while working on track 9 in the receiving yard at Northtown Yard with Woody Swentek, he was injured (IV.Tr.54). He was carrying an all-purpose repair bar which can be used to make many different repairs (IV.Tr.55). As he made his inspection, he noticed a handhold that was smashed against the sill of the car and identified the defective handhold in Plaintiff's Exhibits 4 and 5 (IV.Tr.55). Beimert stated that the handhold could not be used to support either a hand or a foot in a safe and secure manner (IV.Tr.56). The petitioner would have had no occasion to make contact with the handhold and attempt to repair it if it was not defective (IV.Tr.57). He inserted the bar from the top and began pulling on the handhold when it slipped and hit him on the head (IV.Tr.56). His next recollection is being on his knees with Swentek holding a rag on his head and wiping away the blood (IV.Tr.56).

The petitioner was first taken to United Hospital where his wound was stitched up (IV.Tr.57). He treated with Dr. Wethington until July of 1981 and then with Dr. Hall, a neurologist, until October of 1981 (IV.Tr.58-59). His current problems included headaches on almost a daily basis, dizziness and light-headedness, and difficulty sleeping (IV.Tr.59-60). He had no prior history of head injuries (IV.Tr.61). The deposition of Dr. Richard T. Foreman was read to the jury

(IV.Tr.79) and incorporated the details of the treatment and condition which are not relevant to the issues presented for review. The petitioner also sustained a wage loss of ten to eleven days at $11.50 per hour (IV.Tr.61).

The respondent, on cross-examination, and over the objection of the petitioner (IV.Tr.64), was allowed by the court to question the petitioner about the availability of the Jeep repairmen and the equipment they carried and that the Bradley bar was a safer method of straightening a handhold (IV.Tr.63-66). The yard bar the petitioner used was issued to him to straighten handholds and perform other jobs (IV.Tr.68). Beimert testified that he was required by his employer to attempt to repair handholds before calling in the Jeep crew so as to allow the Jeep repairmen to perform their work on the outbound trains (IV.Tr.76). There would be repercussions if he didn't attempt to repair the handhold and just called the Jeep repairmen. The petitioner filled out Plaintiff's Exhibit 3, a personal injury report, on April 30, 1981, and reported that a defect consisting of a bent handhold played a role in causing his injury (IV.Tr.78).

The petitioner rested after offering Plaintiff's Exhibits 1, 2, 3, 4 and 5 into evidence (IV.Tr.81). The court admitted them into evidence (IV.Tr.145).

Prior to the time the respondent called witnesses, the petitioner objected to any testimony regarding alternative methods of doing the work and subsequent repairs because evidence of negligence on the part of the railroad and contributory negligence on the part of its employee were not relevant under the Safety Appliance Act (IV.Tr.84).

The first witness called by the railroad was Kenneth Melin, 56 years of age, a carman employed by the respondent for a period in excess of 33 years (IV.Tr.85). He was a Jeep repairman on April 30, 1981 (IV.Tr.86), and identified Defense Exhibit 1 as a Bradley bar (IV.Tr.87). He testified that a Bradley bar allows

more leverage and was used to straighten the handhold in question after it was heated (IV.Tr.87-88). The handholds on a covered hopper such as the one involved in the petitioner's injury are heavier and a little more difficult to straighten out with a regular bar (IV.Tr.88). Melin admitted that the Bradley bar alone was not sufficient to repair the handhold and that the yard bar used by the petitioner was an all-purpose bar which could be used to straighten handholds (IV.Tr.89-90). Carmen are supposed to attempt to repair the handholds with a yard bar before they call the Jeep repairmen (IV.Tr.90).

Leonard Isdahl, 51 years of age, was employed as the assistant general foreman of cars by the respondent (IV.Tr.91). He testified that the handhold on a covered hopper was a little heavier than on a standard box car (IV.Tr.92). He stated that Bradley bars were available at Northtown Yard on April 30, 1981, by going to the area where they were stored or by calling the Jeep repairmen (IV.Tr.93). He admitted that he had no personal knowledge as to the number of Bradley bars that were available or their exact location at the time of the petitioner's injury (IV.Tr.97). He further admitted that the carmen are supposed to try and repair handholds before calling the Jeep repairmen and that yard bars are used for this repair (IV.Tr.98). He had no knowledge of any directive on the part of the railroad that the yard bar not be used for this purpose.

Pre-trial orders had been issued requiring the parties to submit proposed written instructions. The petitioner initially submitted 23 instructions and two forms of verdict (R.11-35) and subsequently submitted five supplemental instructions (R.64-68). The respondent submitted 24 instructions originally (R.36-63), followed by four supplemental instructions (R.69-73) and a special verdict form (R.74-75). The trial court conducted an instruction conference with reference to these instructions submitted by the parties (IV.Tr.101).

The court indicated it would give petitioner's tendered instructions 7 (R.64); 8 (R.65); 9 (R.66); 15 (R.67), and an un-

numbered one (R.68) (IV.Tr.105). The court indicated it would give respondent's tendered instructions 8A (R.70) and 8B (R.71) (IV.Tr.105). The court further stated it would give respondent's tendered instructions 15C (R.73) and 20 (R.61), read the whole statute when reading petitioner's tendered instruction 15 (R.67), as in respondent's tendered instruction 8A (R.70) and give a boiler plate instruction on the damages of lost wages, disability, and pain and suffering as well as the general introductory and cautionary instructions on jury function and credibility of the witnesses S(IV.Tr.101,105,108-110). The petitioner's attorney asked the court for a written copy of the proposed additional instructions but the court refused (IV.Tr.106,110-111).

The petitioner objected to the giving of defendant's tendered instruction 8B (R.71) for the reason that it interjected contributory negligence in the case as a defense, that sole proximate cause was an improper method of instruction pertaining to proximate cause, and that it had the tendency to confuse the jury and lead to an improper conclusion in light of petitioner's tendered instruction 15 (R.67) (IV.Tr.113-115). The court acknowledged that the giving of the respondent's instruction might be confusing (IV.Tr.114), but did not sustain the objection (IV.Tr.115).

The petitioner then gave his closing argument (IV.Tr.115) followed by the respondent (IV.Tr.121). The railroad argued that the cause of the petitioner's injury was the method he selected to repair the handhold (IV.Tr.129) when he failed to use the appropriate tool when other tools and methods were available (IV.Tr.130).

The reading of the instructions by the trial court did not follow the written instructions submitted by the parties or those additional ones submitted by the court. The trial court referred to respondent's tendered instruction 8B on two occasions.

"[The defendant's position is]...that the accident happened because of the manner in which the plaintiff went about the fixing job. But at all events, the defendant urges quite strongly that the proximate cause of the accident was not the existence of the defective handhold." (IV.Tr.138).

"In order for you to find for the plaintiff under this law, the plaintiff must show by the preponderance of the evidence, the greater weight of the evidence, not only that there was a violation of the Safety Appliance Act, but also that the violation caused the plaintiff's injury. If the injury resulted from some other cause, or as a result solely of the plaintiff's own conduct, then, of course, you must find for the defendant" (IV.Tr.140).

The court gave an instruction which was not submitted by the parties and which was not listed by the court as one that would be given.

"I advise you that the mere happening of an accident causing injuries to a person does not automatically make his employer or anyone else liable. Accidents frequently happen for which you can't assess the cause" (IV.Tr.138).

The trial court failed to read petitioner's tendered instruction 9 (R.66) with the same language pertaining to the element of proximate cause. The instruction specified "the defendant's violation caused or contributed to some injury and consequent damage sustained by the plaintiff." The court required a finding that "the violation was the cause, the proximate cause of this accident" (IV.Tr.138).

The trial court did not follow the language of petitioner's tendered instruction 15 (R.67) and respondent's tendered instruction 8A (R.70) pertaining to the bent handhold being "a cause" of his injuries. Instead, the court required the finding that it was "the cause, the proximate cause of his injuries" (IV.Tr.139).

Following the reading of the instructions and out of the presence of the jury, the petitioner objected to the method of the giving of the instructions and specifically to the instruction pertaining to accidents occurring without liability for the reasons that it was not previously given to the petitioner with an opportunity for review and to make a record and also because it conflicted with the instructions on the Safety Appliance Act as to liability (IV.Tr.144-45).

The jury was discharged at 5:00 p.m. on December 7, 1982, without any cautionary instruction from the court (IV.Tr.147). At 9:15 a.m. on December 8, 1982, the jury returned with a request that the Safety Appliance Act instructions be repeated and a question with respect to when the law is violated (IV.Tr.148). The trial court read the last three paragraphs of defendant's tendered instruction 8A (R.70) (IV.Tr.148-49). The trial court went on to make the following statement:

> "The purpose of this law is to protect people who are using it, like - what does the law say? '...greater security to men in coupling and uncoupling cars.' "
>
> "But in this case, it wasn't being used. The very purpose for this plaintiff being there was to check to see that everything was okay, and when they came and found it deficient, he was supposed to be repairing it. So, it wasn't as a result of the deficiency in that hand iron that the injury came; it was because of the way in which this plaintiff attempted to fix it" (IV.Tr.150).

After the jury was discharged, the petitioner made a record as to the quoted comment by the court on the basis that it, in essence, directed the jury to return a verdict for the respondent and was contrary to the law and instructions which should have been given (IV.Tr.152).

The jury deliberations resumed at 9:22 a.m. (IV.Tr.151). By 9:45 a.m. the jury ws back in the courtroom announcing a ver-

dict for the respondent (IV.Tr.152). The order of judgment was entered on December 8, 1982 (R.78) and the notice of appeal was filed with the clerk of the district clerk on December 27, 1982 (R.79).

EXISTENCE OF JURISDICTION BELOW

The District Court for the District of Minnesota had jurisdiction over this case under 45 U.S.C. §56.

ARGUMENT

I. The Trial Court Abused His Office And Deprived The Petitioner Of His Constitutional Right to A Trial By Jury As Guaranteed By The Seventh Amendment Through Improper Comments Which Withdrew From The Jury The Determination Of The Issue Of Proximate Cause.

The petitioner recognizes the limitations imposed upon this court in granting petitions of certiorari but implores the court to accept this particular case because the decision by the Eighth Circuit Court of Appeals clearly conflicts with the applicable decisions of this court and because it sanctioned a gross departure by the trial court from the accepted and usual course of judicial proceedings so as to require the exercise of this court's supervision as specified by Rule 19.

The trial of this cause took place on December 7, 1982. The jury did not return a verdict on that date, but returned on December 8, 1982 to resume deliberations (IV.Tr.148). At 9:15 a.m. the jury asked the court to repeat the Safety Appliance Act instructions and answer a question with respect to when the act is violated (IV.Tr.148). The court read a portion of defendant's tendered instruction 8A (IV.Tr.148-49) and then made a comment which was not incorporated within any instruction submitted to the court and which was contrary to the applicable decisions of this court.

> "The purpose of this law is to protect people who are using it, like - what does the law say? '...greater security to men in coupling and uncoupling cars.' "
>
> "But in this case, it wasn't being used. The very purpose for this plaintiff being there was to check to see that everything was okay, and when they came and found it deficient, he was supposed to be repairing it. So, it wasn't as the result of the deficiency in that hand iron that the injury came; it was because of the way in which this plaintiff attempted to fix it" (IV.Tr.150).

The trial court grossly misstated the law when making this comment to the jury. The court improperly limited the application of the Safety Appliance Act to the act of coupling and uncoupling cars while foreclosing all others. The plaintiff, in legal memoranda filed on December 3, 1982 (IV.Tr.112), apprised the court of the broad scope of the Safety Appliance Act.

The case law clearly demonstrates that the Safety Appliance Act is to be liberally construed so as to give a right of recovery for every injury which was proximately caused, in whole or in part, from defective appliances in violation with the statute. *Smiley v. St. Louis - San Francisco Ry. Co.*, 359 Mo. 474, 222 S.W.2d 481, 484 (1949); *Brady v. Terminal R. Ass'n of St. Louis*, 303 U.S. 10, 58 S.Ct. 426, 429 (1938). The employee need not be engaged in an operation in which the safety appliances are specifically designed to furnish him protection. *Davis v. Wolfe*, 263 U.S. 239, 44 S.Ct. 64, 66 (1923).

> "[T]his Act, fairly interpreted, must be held to protect all who need protection from dangerous results due to maintenance or operation of congressionally prohibited defective appliances... Liability of a railroad under the Safety Appliance Act for injuries inflicted as a result of the Act's violation follows from the unlawful use of prohibited defective equipment 'not from the position the employee may be in, or the work which he may be doing at the moment he is injured.' " *Coray v. Southern Pac. Co.*, 335 U.S. 520, 69 S.Ct. 275, 276-77 (1949).

The use of an appliance for a purpose other than which it was intended does not defeat recovery. *Lehigh Valley R. Co. v. Howell*, 6 F.2d 784, 786 (2d Cir. 1925). In *Fort Street Union Depot Co. v. Hillen*, 119 F.2d 307 (6th Cir. 1941), liability was upheld where an employee riding one car was struck by a protruding hand iron from another car as the cars passed one another.

The comment by the trial court was not only an inaccurate statement of the law, but also, in essence, directed a verdict on the issue of proximate cause, the only real issue of liability presented to the jury (IV.Tr.150), and removed it from the consideration of the jury in violation of the plaintiff's constitutional right to trial by jury.

> "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen whether guaranteed by the Constitution or provided by statute should be jealously guarded by the courts." *Jacob v. City of New York,* 315 U.S. 752, 62 S.Ct. 854 (1942).

The respective roles of the judge and jury under the Seventh Amendment have been set forth in *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.,* 356 U.S. 525, 78 S.Ct. 893, 901 (1958).

> "An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence - if not the command - of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury."

The issue of proximate cause was certainly one for the jury. Disputed fact issues should be left for the determination of the jury. *Security Benefit Life Insurance Company v. Jackson,* 318 F.2d 846, 849 (8th Cir. 1963); *Hardware Mutual Casualty Company v. Jones,* 363 F.2d 627, 633 (4th Cir. 1966).

The discretion of a trial judge to comment on the evidence does not go so far as to allow him to effectively remove factual issues from the jury's determination. *Callen v. Pennsylvania R. Co.,* 332 U.S. 625, 68 S.Ct. 296, 297 (1948). Judicial comment should be limited to a fair explanation of the contentions of the parties with respect to the evidence and should not include an

argument by the court in support of the contentions. *Virginian Ry. Co. v. Armentrout,* 166 F.2d 400, 405 (4th Cir. 1948). The parameters of the privilege of judicial comment and the necessity of safeguards and limitations were clarified by Chief Justice Hughes in *Quercia v. United States,* 289 U.S. 466, 470, 53 S.Ct. 698, 699 (1933).

> "This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office...His privilege of comment in order to give appropriate assistance to the jury is too important to left without safeguards against abuses. The influence of the trial judge on the jury 'is necessarily and properly of great weight' and 'his lightest word or intimation is received with deference, and may prove controlling.' This court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence 'should be so given as not to mislead, and especially that it should not be one-sided.' "

The trial judge in this case clearly abused the discretion of his judicial office in advising the jury that the proximate cause of the petitioner's injuries was not the violation of the Safety Appliance Act but the method in which he utilized to perform the work. The trial judge succeeded in withdrawing the issue of proximate cause from the jury and improperly replacing it with contributory negligence. A withdrawal of a factual issue from the jury in this manner has been held to be reversible error in a case under the Federal Employers' Liability Act, *Callen v. Pennsylvania R. Co., supra,* and under the Jones Act. *Jacob v. City of New York, supra.* In *Krasowski v. Greyhound Lines, Inc.,* 402 F.2d 445, 448 (6th Cir. 1968), the trial court advised the jury that the conduct of the bus driver constituted failure on his part to exercise the highest degree of care required by law. The reviewing court held that comment to constitute a direction of a

verdict in favor of the plaintiff on the issue of negligence which was improper and constituted reversible error. In *Coray v. Southern Pac. Co., supra* at 277, it was held to be reversible error for a court to direct a verdict and remove the issue of proximate cause from the jury. A similar result followed in *United States v. Murdock,* 290 U.S. 389, 393-94, 54 S.Ct. 223 (1933). The same result is mandated in this case by previous decisions of this court.

The effect of the trial judge's comments was also magnified since it constituted the last words the jury heard from him before returning the verdict. The timeliness and the impossibility of mitigating the effect of the comments were recorded in *Bollenbach v. United States,* 326 U.S. 607, 612, 66 S.Ct. 402, 405 (1946).

> " 'The influence of the trial judge on the jury is necessarily and properly of great weight,' *Starr v. United States,* 153 U.S. 614, 626, 14 S.Ct. 919, 923, 38 L.Ed.841, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptional and unilluminating abstract charge."

The effect of the comment by the trial court is accurately demonstrated by the return of the jury with a verdict within 23 minutes of the improper comment by the trial court.

The only issues presented for the jury's determination were proximate cause and damages. The trial judge pointed out that it was clear from the evidence that the railroad had violated the Safety Appliance Act (IV.Tr.134-35). The comments of the trial court clearly exceeded the discretion of the court to comment on the evidence and deprived the petitioner of his constitutional right to trial by jury of all factual issues as guaranteed by the Seventh Amendment. The misconduct of the trial judge was so gross as to mandate the exercise of the supervisory power of

this court to correct this grave abuse. Therefore, the petitioner respectfully requests this court to exercise its discretion to grant certiorari in this case so as to allow review of this critical and significant reversible error to the prejudice of the petitioner.

II. The Trial Court Committed Reversible Error To The Prejudice Of The Petitioner And In Violation Of Rule 51 Of The Federal Rules Of Civil Procedure Through The Delivery Of The Instructions To The Jury With Material Changes From Those The Court Represented Would Be Given And Through The Creation Of An Additional Instruction.

The parties were required through the pre-trial procedure to submit proposed written instructions and both parties submitted several sets of instructions (R.11-75). The trial court ws unspecific relative to the instructions it would give on the issues of damages, credibility of the witnesses, and the cautionary instructions on jury function (IV.Tr.101, 105, 108-110). The petitioner requested a written copy of the proposed instructions but the court refused to give copies of the instructions or the specific language of the instructions (IV.Tr.106,110-111).

When the trial court gave the instructions, there were numerous misstatements of the law and the creation of a new instruction, all to the prejudice of the petitioner. The trial court inserted a new instruction which was most similar to defendant's tendered instruction 13 even though the court had not indicated that instruction would be given.

> "I advise you that the mere happening of an accident causing injuries to a person does not automatically make his employer or anyone else liable. Accidents frequently happen for which you can't assess the cause" (IV.Tr.138).

Immediately after the trial court read the instructions and out of the presence of the jury, the petitioner objected to this instruction for the reason that it was not previously given to the petitioner with an opportunity for review and to make a record

and also because it conflicted with the instructions on the Safety Appliance Act as to liability (IV.Tr.144-45).

The instruction clearly was improper in a case under the Safety Appliance Act and prejudicial to the petitioner because it conflicted with the absolute nature of liability under the Safety Appliance Act and the language of plaintiff's tendered instruction 15 (R.67). The respondent railroad had an absolute duty to comply with the Safety Appliance Act. *Affolder v. New York C. & St.L.R.Co.*, 339 U.S. 96, 98, 70 S.Ct. 509 (1950); *Louisville & Nashville Railroad Company v. Layton*, 243 U.S. 617, 620, 37 S.Ct. 456 (1917). Once a violation was established, the liability is absolute. The only remaining issue was proximate cause. *Cobb v. Union Railway Company*, 318 F.2d 33, 35 (6th Cir. 1963), *cert. denied*, 375 U.S. 945, 84 S.Ct. 352 (1963). The instruction created by the trial court was inconsistent with the absolute liability and an absolute duty to comply with the statute and prejudiced the petitioner. The petitioner, of course, had already argued his case to the jury on the premise that an instruction of this nature would not be given. The petitioner had no ability to counteract the effect of the instruction which was subsequently magnified by the method of delivery and amendment by the court of other instructions.

The trial court amended the burden of proof instruction submitted by the petitioner. Plaintiff's tendered instruction 9 (R.66) indicated that the plaintiff had the burden to show that the "defendant's violation caused or contributed to some injury and consequent damage sustained by the plaintiff." Instead, the court amended the instruction to impose the burden on the petitioner of proving "the violation was the cause, the proximate cause of the accident" (IV.Tr.138). The amendment improperly required the petitioner to prove common-law proximate causation rather than the lesser burden of showing that the injury resulted in whole or in part from the railroad's violation of the Safety Appliance Act. *Crane v. Cedar Rapids & Iowa City Railway Company*, 395 U.S. 164, 166, 89 S.Ct. 1706, 1708

(1969). See also *Rogers v. Missouri Pacific Railroad Company,* 352 U.S. 500, 77 S.Ct. 443, 448-49 (1957). The amendment to the instruction was also prejudicial because it referred to the occurrence as an "accident" which enhanced the prejudicial effect of the court's created instruction. A similar erroneous substitution of proximate cause under the Safety Appliance Act with common-law proximate causation occurred through the court's amendment of plaintiff's tendered instruction 15 (R.67) and defendant's tendered instruction 8A (R.70) (IV.Tr.139).

Plaintiff's tendered instruction 9 (R.66), as all instructions specifying the burden of proof, is considered to be of major importance. *Sheppard Federal Credit Union v. Palmer,* 408 F.2d 1369, 1372 (5th Cir. 1969). Error in instructing the jury as to the proper burden of proof has been held to be such a fundamental error and so highly prejudicial that it justifies appellate review even if no objection had been made. *Raytay v. Lincoln National Life Insurance Company,* 378 F.2d 209, 212 (3d Cir. 1967), *cert. denied,* 389 U.S. 973, 88 S.Ct. 472 (1967). *See also Williams v. City of New York,* 508 F.2d 356, 362 (2d Cir. 1974).

The trial judge's obligation to inform counsel, in advance of the arguments to the jury, of his proposed action upon written requests for instructions is mandatory under Rule 51 of the Federal Rules of Civil Procedure. *Hardigg v. Inglett,* 250 F.2d 895, 897 (4th Cir. 1957). Where, as in this case, the instructions given by the court, when compared to those the court indicated to counsel would be given to the jury, demonstrate variations to the degree that counsel were not effectively or specifically informed of the content of the instructions the court intended to give, in order to permit counsel to argue the case intelligently, the conduct of the court constitutes reversible error. *Delano v. Kitch,* 542 F.2d 550, 555 (10th Cir. 1976). The same result must follow when the instructions which are read have been amended to include improper and prejudicial misstatements of law.

The refusal by the trial court to conform with Rule 51 of the Federal Rules of Civil Procedure constituted reversible error

and necessitates the exercise of the supervisory power of this court through certiorari.

III. The Trial Court Committed Reversible Error To The Prejudice Of The Petitioner In Giving Defendant's Instruction No. 8B Over The Objections Of The Petitioner.

The parties, pursuant to pretrial orders, submitted proposed written instructions for consideration by the trial court. The respondent, in its supplemental request for jury instructions (R.69) submitted No. 8B (R.71).

> "In order for you to find for the plaintiff under the Safety Appliance Act, plaintiff must show by a preponderance of the evidence not only that there was a violation of the Safety Appliance Act, but also that the violation caused the plaintiff's injury. If the injury resulted from some other cause, or as a result solely of the plaintiff's own conduct, then you must find for the defendant."

The petitioner strenuously objected to the proposed instruction for the reasons that it was not an accurate statement of the law, it improperly interjected contributory negligence as a defense, that sole proximate cause was an improper method of instruction pertaining to proximate cause, and that it had the tendency to confuse the jury and lead to an improper conclusion in light of plaintiff's tendered instruction 15 (R.67) (IV.Tr.113-115). In spite of these objections and the acknowledgement by the trial court of potential confusion (IV.Tr.114), the lower court gave the instruction (IV.Tr.115).

The respondent offered instruction No. 8B for the sole purpose of arguing contributory negligence on the part of the petitioner as a defense to a violation of the Safety Appliance Act. The respondent then proceeded to make that argument (IV.Tr.129-30). The respondent was clearly deprived of the defenses of contributory negligence and assumption of the risk

where, as in this case, the violation of the Safety Appliance Act contributed to the injury. *Crane v. Cedar Rapids & Iowa City Railway Company,* 395 U.S. 164, 166, 89 S.Ct. 1706, 1708 (1969); *Coray v. Southern Pac. Co.,* 335 U.S. 520, 69 S.Ct. 275, 277 (1949). The very argument made by the respondent pursuant to the instruction, the alleged choice of an unnecessarily dangerous method by the plaintiff of performing his duties, was held to amount to no more than evidence of contributory negligence or assumption of the risk which were removed from consideration by the Safety Appliance Act in *Fort Street Union Depot Co. v. Hillen,* 119 F.2d 307, 311 (6th Cir. 1941).

The Plaintiff's Instruction No. 15 (R.67) properly stated the law relative to the issues of proximate cause and contributory negligence under the Safety Appliance Act.

> "The plaintiff alleges that, at the time and place in question, the handhold on the railway car was defective in this respect: that the handhold was mashed and could not be utilized. Plaintiff further alleges that the defective handhold was a cause of plaintiff's injuries and consequent damages.
>
> Section 4 of the Federal Safety Appliance Act provides in part that:
>
> 'It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure handholds and grab irons in the ends and sides of each car.'
>
> If you should find from a preponderance of the evidence that the defendant violated the provisions of Section 4 of the Federal Safety Appliance Act, as alleged, and that the violation played any part, no matter how small, in bringing about or actually causing injury to the plaintiff, then the plaintiff is entitled to recover from the defendant such damages as the jury shall find from a preponderance of the

evidence that the plaintiff actually sustained as a result of the violation of the Federal Safety Appliance Act, without any requirement of a showing of negligence on the part of the defendant.

You are further instructed that contributory negligence is not a defense in whole or in part to damages caused in whole or in part by violation of the Federal Safety Appliance Act." (R.67).

The trial judge, as the primary editor of the instructions publication in which it was published, approved of the instruction as an appropriate statement of the law. A preemptory instruction of this nature was mandated in *O'Donnell v. Elgin, J.& E. Ry. Co.*, 338 U.S. 384, 70 S.Ct. 200, 206 (1949).

The giving of Plaintiff's Instruction No. 15 and Defendant's Instruction 8B resulted in two inconsistent statements relative to the effect, if any, of contributory negligence to a claim under the Safety Appliance Act. This conflict could only result in confusion on the part of the jury. The prejudicial effect of this confusion has been neatly summarized in 5 Am Jur 2d, Appeal and Error §813 (1962).

"Where instructions are inconsistent and contradictory, involving a material point in the case, or where separate instructions are in such hopeless, irreconcilable conflict as to leave confusion in the minds of the jury, or where it was impossible to tell which of the conflicting rules was followed by the jury, their submission to the jury is prejudicial for the reason that it is impossible to know what effect they may have had on the verdict."

Defendant's Instruction No. 8B was fatally defective in that it failed to confine the decision of the jury to the proper elements of the case. *Time, Inc. v. Hill*, 385 U.S. 374, 396-97, 87 S.Ct. 534, 546 (1967). As a consequence of the fatal defect and attendant prejudice to the petitioner, certiorari should be granted to facilitate full review of this prejudicial error.

The prejudicial error of the trial court in giving the instruction was enhanced by the emphasis the trial court gave the instruction. The trial court did not refer to the instruction once, but detailed it to the jury on two occasions. On the first occasion, the court read it to the jury as a "position" of the defendant and gave undue emphasis to the instruction by stating that the respondent urged the contention "quite strongly" (IV.Tr.138). When the trial court read the instruction on the second occasion, the court's approval and emphasis was incorporated through the words "of course" when instructing that the finding should be for the respondent (IV.Tr.140).

The respondent cannot maintain that its purpose of offering this instruction was not to interject the issue of contributory negligence in the trial of this case. The railroad showed its real purpose and true colors on several occasions and left little doubt that it was intent in getting the issue of contributory negligence before the jury. The respondent, in response to an objection by the petitioner to its opening statement, stated to the court that "if we can establish that the injury resulted solely through the negligence of Mr. Beimert, that would be a defense even to the Safety Appliance Act" (IV.Tr.26). Again, in closing argument, the defendant advised the jury that the cause of the injury was the fact that the petitioner "got careless" with the tool (IV.Tr.130). Clearly the railroad was bent upon getting the issue of contributory negligence before the jury even though the law clearly demonstrated that this was not a defense, in whole or in part. The trial court, through the reading of defendant's tendered instruction 8B, improperly made contributory negligence a defense, erroneously instructed the jury on proximate cause, and caused unwarranted confusion for the jury which was demonstrated by its subsequent request for the Safety Appliance Act instructions to be repeated. As a consequence, reversible error to the prejudice of the petitioner followed which necessitates review by the court under its supervisory power and because of direct conflicts with the precedents of this court.

IV. The Trial Court Committed Reversible Error In Admitting Evidence Of Contributory Negligence And Allowing The Respondent To Argue It To The Jury As A Defense To The Safety Appliance Act.

The amended complaint alleged causes of action under the Safety Appliance Act and the Federal Employer's Liability Act (R.1-6). The petitioner withdrew the count under the Federal Employers' Liability Act and only tried Count II pertaining to the Safety Appliance Act (IV.Tr.17,26) as a matter of trial strategy to keep out any evidence of contributory negligence. This strategy was nullified completely by the conduct of the trial court in permitting argument by the railroad and evidence of contributory negligence to be presented to the jury.

The respondent, during its opening statement, over a timely objection by the petitioner, was permitted to argue that the cause of the petitioner's injuries was the method he selected to do the work when there were other methods such as bad-ordering the car, getting others to do it, or using a Bradley bar which was "more suitable" and "a much safer method" (IV.Tr.26-27). The respondent told the court that "if we can establish that the injury resulted solely through the negligence of Mr. Beimert, that would be a defense even to the Safety Appliance Act" (IV.Tr.26). Over the objection of the petitioner on the basis of relevancy of alternative methods of doing the work under the Safety Appliance Act (IV.Tr.42), the respondent was permitted to elicit testimony from Woodrow Swentek that Jeep repairmen could have been called in to do the work and that a Bradley bar was a better and safer tool than the yard bar used by the petitioner because it provided more leverage (IV.Tr.43-47). Once again, over the objection of the petitioner, the respondent was permitted to cross-examine the petitioner about the availability of the Jeep repairmen and the equipment they carried and that the Bradley bar was a safer method of straightening a handhold (IV.Tr.63-66). The petitioner also objected to any testimony by Kenneth Melin and Leonard Isdahl

regarding alternative methods of doing the work and subsequent repairs on the basis that evidence of negligence on the part of the railroad and the contributory negligence on the part of its employee were not relevant under the Safety Appliance Act (IV.Tr.84). Melin identified a Bradley bar which was admitted into evidence as Defense Exhibit 1, and testified that it provided more leverage and was used to repair the handhold in question after it was heated (IV.Tr.87-88). Both Melin and Isdahl testified that the handhold on a covered hopper was heavier than the handholds on a regular box car (IV.Tr.88,92). Melin testified that the handhold on a covered hopper was more difficult to straighten with a regular bar than a handhold on a standard box car (IV.Tr.88). Isdahl provided testimony on the general availability of Bradley bars at the time of the occurrence (IV.Tr.93). Finally, the respondent, in closing argument, contended that the cause of the petitioner's injury was the method he selected to repair the handhold (IV.Tr.129) when he failed to use the appropriate tool when other tools and methods were available (IV.Tr.130). The respondent told the jury that the petitioner was injured because "he got careless with" the tool (IV.Tr.130).

It is clear that evidence of contributory negligence and argument of that defense as a cause of the injury to the petitioner was permitted by the trial court. It is equally clear that the railroad is not entitled to the defenses of contributory negligence and assumption of the risk under the Safety Appliance Act. *Crane v. Cedar Rapids & Iowa City Railway Company*, 395 U.S. 164, 166, 89 S.Ct. 1706, 1708 (1969); *Chicago Great Western R. Co. v. Schendel*, 267 U.S. 287, 45 S.Ct. 303, 305 (1925). The choice of an unnecessrily dangerous method by the petitioner of performing his duties has been held to amount to no more than evidence of contributory negligence or assumption of the risk which have been removed from consideration under the Safety Appliance Act. *Fort Street Union Depot Co. v. Hillen*, 119 F.2d 307, 311 (6th Cir. 1941).

The trial court committed reversible error in admitting evidence of contributory negligence and granting the respondent complete freedom to argue it to the jury. The Eighth Circuit Court of Appeals, in reviewing this issue, ignored the precedents of this court and elected to cite obscure state court decisions even though the interpretation by the federal courts is controlling under the Safety Appliance Act. Because of the direct and irreconcilable conflicts with the opinions of this court, certiorari should be granted to facilitate a complete review of these prejudicial errors.

CONCLUSION

The opinion of the Eighth Circuit Court of Appeals failed to discuss and resolve the issues presented. The opinion held that the instructions of the trial court were not as clear as they might have been but failed to discuss the misstatements of law within the instructions which the court recognized during oral argument. The opinion lacked the courage of conviction because of its failure to quote the last comment by the trial court to the jury in which the issue of proximate cause was removed from consideration and provide any support or argument that it was harmless. The Eighth Circuit Court of Appeals avoided this issue because the deprivation of the constitutional right to trial by jury can never be justified.

The conduct of the trial court and the cursory review by the Eighth Circuit Court of Appeals are in conflict with numerous decisions of this court as well as the oath of office required of all federal judges. This case, because of the inherent injustices throughout, warrants the involvement of the supervisory power of the court through certiorari.

Respectfully submitted,

Randolph E. Schum
Paul L. Pratt, P.C.
P.O. Box 179
East Alton, IL 62024
(618) 259-8011

Attorneys for Petitioner

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-1010

Francis A. Beimert,
Plaintiff-Appellant,

v.

Burlington Northern, Inc.,
a corporation,
Defendant-Appellee.

On appeal from the United
States District Court for
the District of Minnesota

Submitted: June 15, 1983

Filed: February 2, 1984

Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and BROWN*, Senior Circuit Judge.

PER CURIAM.

Plaintiff, Francis A. Beimert, appeals from a judgment entered on a jury verdict in favor of the defendant, Burlington Northern, Inc. Beimert brought this action under the Federal

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* The Honorable Bailey Brown, Senior Judge, United States Court of Appeals for the Sixth Circuit, sitting by designation.

Employers Liability Act (FELA), 45 U.S.C. §§ 51-60, and the Safety Appliance Act, 45 U.S.C. §§ 1-16, seeking to recover for injuries he received while attempting to repair a handhold on a railroad car in the course of his employment with the defendant railroad. On appeal, Beimert argues that the district court erred in the admission of evidence, in its instructions to the jury, in failing to fairly apprise plaintiff, contrary to the requirements of Rule 51, Fed.R.Civ.P., as to the charge it would give to the jury, and in allowing defense counsel to make an improper opening statement and to make an improper argument to the jury.

On April 30, 1981, Beimert, while employed as a carman by the defendant, was inspecting railroad cars at Burlington Northern's railroad yard in Northtown, Minnesota. Beimert noticed that a handhold on a hopper car had been crushed against the side of the car. Using a "yard bar" that he carried to make minor repairs on the cars he inspected, Beimert attempted to straighten the handhold. He inserted the bar from the top and pulled downward. The bar slipped and struck Beimert on the forehead causing the injury for which he sued.

Beimert's complaint initially contained two counts. The first count was a negligence count under the FELA, 45 U.S.C. §§ 51-60. More particularly, he charged that the defendant was guilty of negligence in failing to provide him with a safe place and methods to work, in failing to furnish him with suitable tools, and in failing to furnish sufficient manpower to perform the task. In the second count, again relying on the FELA,[1] Beimert alleged only a violation of Section 4 of the Safety Appliance Act, 45 U.S.C. § 4, which makes it unlawful to use a car

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[1] The FELA "embraces claims of an employee based on violations of the Safety Appliance Act." *Crane v. Cedar Rapids & I.C. Ry.*, 395 U.S. 164, 166 (1969).

that is not provided with secure handholds.[2] Just prior to trial, however, Beimert obtained a dismissal of the first count, the negligence count, and relied only on the alleged violation of the Safety Appliance Act.[3]

At the one day trial, Beimert objected to defendant's opening statement and later to its argument to the jury to the effect that the sole cause of the accident was Beimert's negligence. Beimert also objected to the admission of evidence to support the defendant's contention. The district court properly overruled these objections. If the plaintiff's negligence was the *sole* cause, then the violation of the Safety Appliance Act could not have contributed in whole or in part to the injury. *Miller v. Gulf, M.& O. R.R.*, 386 S.W.2d 97, 101 (Mo. 1964); *Johnson v. Chicago Great Western Ry.*, 242 Minn. 130, 136, 64 N.W.2d 372, 377 (1954).

We are also satisfied that the district court committed no reversible error under Rule 51, Fed.R.Civ.P., in apprising Beimert as to its intended instructions to the jury. Further, the court was not required, as Beimert contends it was required, to supply him with a copy of its intended instructions.

Beimert also contends that the district court's instructions to the jury, including the additional instructions given at the request of the jury, created the impression that, to support liabili-

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[2] Section 4 provides: "It shall be unlawful for any railroad company to use any car in interstate commerce that is not provided with secure grab irons or handholds in the ends and sides of each car for greater security to men in coupling and uncoupling cars."

[3] Beimert's stated purpose for withdrawing the negligence count under the FELA was to keep the issue of contributory negligence from the jury. For a negligence claim under the FELA, contributory negligence is not a bar but may reduce the damages. The FELA provides, however, that contributory negligence may not reduce damages when the claim is founded on a violation of the Safety Appliance Act. 45 U.S.C. § 53. *See Carter v. Atlanta & St. A.B. Ry.*, 338 U.S. 430 (1949).

ty for violation of the Safety Appliance Act, it was necessary to show that the violation was the sole cause or at least a "proximate" cause of the accident. It is, of course, sufficient, to make a case of liability for violation of the Safety Appliance Act, only to show that the violation is a causative factor contributing in whole or in part to the accident.[4] The defendant contends, on the other hand, that the charge, taken as a whole, is to the effect that it is sufficient, to make a case of liability, to show that the violation of the Act contributed in whole or in part to the accident.

This case was tried on the theory that if defendant's violation of the Safety Appliance Act contributed in whole or in part to the accident and injury, defendant was liable to Beimert. The defendant railroad's defense at trial was that Beimert's alleged negligence was the sole cause of the accident and injury. As before stated, these trial theories are in accordance with applicable law. We agree that the trial court's instructions on the law with respect to these issues were not as clear as they might have been. Nevertheless, in view of the trial theories of the parties and the evidence submitted, we conclude that the instructions adequately informed the jury as to the applicable law and do not constitute reversible error.[5]

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[4] The standard of causation is variously expressed. The employer is liable if the injury results "in whole or in part" from defendant's violation, *Carter v. Atlanta & St. A.B. Ry.*, 338 U.S. 430, 435 (1949) or if the violation is "a contributory proximate cause" of injury, *Coray v. Southern Pac. Ry.*, 335 U.S. 520, 523 (1949), or if the defect is "a proximate cause of the accident." *Minneapolis, St.P. & Sault Ste.M. Ry. v. Goneau*, 269 U.S. 406, 410 (1926). In *Rogers v. Missouri Pac. Ry.*, 352 U.S. 500, 506 (1957) the Court warned against the use of the language of proximate causation for claims based on the FELA.

[5] We note that the defendant railroad contends that the judgment below should be affirmed on the basis that the district court should have granted its motion for a directed verdict. In this connection, defendant contends that there can be no liability for violation of the

Finding no reversible error in the record, the judgment of the district court is Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Safety Appliance Act where, as here, the employee is injured while performing his duty of repairing the defect that constituted the violation of the Act, and an alleged "cause" of the accident is the very existence of such defect. In view of our disposition of this case, we need not decide whether there is such a narrow exception to liability for violation of the Act. *Cf. Minneapolis St.P. & Sault Ste.M. Ry. v. Goneau*, 269 U.S. 406 (1926); *Illinois Trust Co. v. Missouri Pac.R.R.*, 319 Mo. 608, 5 S.W.2d 368, *cert. denied*, 278 U.S. 623 (1928); *Martin v. St. Louis-San Francisco Ry.*, 323 Mo. 450, 19 S.W.2d 470 (1929); *Rittenhouse v. St. Louis-San Francisco Ry.*, 299 Mo. 199, 252 S.W.945 (1923); *Smiley v. St. Louis-San Francisco Ry. Co.*, 359 Mo. 474, 222 S.W.2d 481 (1949).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

83-1010-MN.

September Term, 1983

Francis A. Beimert,
Appellant,

v.

Burlington Northern, Inc., A
Corporation,
Appellee.

Appeal from the United States
District Court for the
District of Minnesota

The Court, having considered appellant's petition for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing en banc denied.

March 7, 1984

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civil Case No: 3-82-167

Date: 12-8-82

Francis A. Beimert
Plaintiff,

v.

Burlington Northern, Inc.
Defendant.

Clerk's Notice under Rule 77(d)
Federal Rules of Civil Procedure

You are hereby notified that the following was filed this date in the above mentioned action.

JUDGMENT is entered in favor of deft., Burlington Northern, Inc., and against pltff., Francis A. Beimert

RANDOLPH DAWDY
Route #111 at Airline Drive
P.O. Box #179
East Alton, IL 62024

ROBERT E. HESS, CLERK

H. K. BRADFORD, JR.
176 East Fifth St.
St. Paul, MN 55101

By (Illegible) Deputy

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